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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/712,280	11/12/2003	Patrick Guiney	11.037011 US	9311

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VISTA IP LAW GROUP LLP
12930 Saratoga Avenue
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EXAMINER

HYUN, PAUL SANG HWA

ART UNIT	PAPER NUMBER
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1797

MAIL DATE	DELIVERY MODE
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10/30/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/712,280

Applicant(s)

GUINEY, PATRICK

Examiner

Paul S. Hyun

Art Unit

1797

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 17 October 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.

b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ They raise the issue of new matter (see NOTE below);
- (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
- The status of the claim(s) is (or will be) as follows:
- Claim(s) allowed: _____.
- Claim(s) objected to: _____.
- Claim(s) rejected: _____.
- Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

Continuation of 3. NOTE: The proposed amendment to claim 39 changed the scope of the claim as well as the scope of the claims dependent on claim 39. Claim 39 now explicitly recites that the claimed invention comprises a vial.

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's arguments are not persuasive.

1) Applicant argues that the bar code disclosed by McDevitt et al. ("McDevitt") is configured to identify the sensor array, not information related to the filter as recited in the claim. This argument is not persuasive. As discussed in the rejection, the scope of the limitation "related to the filter" is broad enough that information identifying the sensor array can be construed to be related to the filter that is used in the sensor array. McDevitt discloses that information identifying the sensor array comprises the type of test being conducted by the sensor array and the identity of the sample being collected, and that this information can be relayed by means of a bar code. This information is related to the filter because the identity of the analyte being analyzed or the nature of the test being conducted often requires the use of a specific filter. For instance, one of ordinary skill in the art would recognize that filtering blood for blood cells and filtering a sample for a specific protein would require two distinct filters.

2) Applicant argues that the information identifying the sensor array, specifically information directed towards the type of sample being collected and the type of test being performed are not stored in the bar code disclosed by McDevitt. Rather, Applicant argues that this information is input by a user according to McDevitt. This argument is not persuasive. McDevitt discloses that the information can be input by a user OR the information can be stored in a bar code. It appears from the disclosure that the bar code can be used to store the same exact information that can be input by a user.


3) Applicant argues that the bar code disclosed by McDevitt does not relay the number of steps involved in a test protocol. Specifically, Applicant argues that it is not inherent that the steps of a test protocol are relayed by the bar code. Rather, Applicant argues that relaying of the steps of a test protocol is merely speculation. This argument is not persuasive because McDevitt discloses that a controller can set up the appropriate analysis conditions for the sensor array based on the test being performed, and that the information identifying the test to be performed can be relayed to the controller by means of a bar code (see [0573]). Based on the disclosure, it is evident that the steps of the test are stored in the bar code. Otherwise, the controller would not be able to set up the appropriate analysis conditions. To set up the appropriate analysis conditions, one would have to know, for instance, how long the filtering process takes, what is being filtered, and what means is being utilized to analyze the sample.

4) Applicant argues that McDevitt does not disclose the limitations of claims 39-42. This argument is moot since the argument is based on the scope of the amended claims, which now recite that the invention comprises a vial.

5) Applicant argues that McDevitt does not disclose or even provide motivation for using a cytological filter. Applicant argues that McDevitt discloses that prior to analysis, bodily fluids will typically require filtration. Applicant argues that because bodily fluid samples are filtered prior to analysis, there is no motivation to provide the sensor array with another cytological filter. This argument is not persuasive because Applicant appears to have misinterpreted the disclosure of the reference. The very same paragraph of the reference discloses that it is the filter in the sensor array that is intended to filter the bodily fluids, not a separate filter that is distinct from the filter in the sensor array. Because the filter in the sensor array is intended to filter bodily fluids, there is very good motivation to provide the sensor array disclosed by McDevitt with a cytological filter.

6) Applicant argues that neither McDevitt nor Marsh et al. ("Marsh") disclose a data storage device positioned in a recess. This argument is not persuasive. As discussed in the rejection, the ADD disclosed by McDevitt can communicate with a computer via a docking means. The disclosure suggests that the data storage device, or at least a part of it, is situated within the recess of the docking means. With respect to Applicant's argument that Marsh and McDevitt are not analogous art, Marsh and McDevitt are analogous art with respect to their disclosure of the docking means. Since McDevitt simply discloses that the ADD can be connected to a computer system via well-known means, one of ordinary skill in the art would rely on references such as Marsh for providing the ADD disclosed by McDevitt with proper or compatible docking connection.

7) Applicant argues that McDevitt and Giordano et al. ("Giordano") are not analogous art. This argument is not persuasive. The references are analogous with respect to the disclosure of filters. Giordano discloses the use of expiration dates for a filter. One of ordinary skill in the art would recognize that the use of an expiration date for a filter can be applied to other filters, and not limited to the specific use of the filter as disclosed by Giordano.


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